SUPREME COURT, U. S.

FILED
FEB 3 1969
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 915

WILLARD HORACE COLSON,
Petitioner

v.

STATE OF NORTH CAROLINA,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT MORGAN
Attorney General

BERNARD A. HARRELL
Assistant Attorney General

COUNSEL FOR RESPONDENT

INDEX

Opinions Below 1

Jurisdiction 1

Question Presented 2

Statement 2

Decision Below 5

Argument 6

Conclusion 17

TABLE OF CITATIONS

Amos v. U. S., 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654 10

Bumper v. North Carolina, 88 S. Ct. ....., 20 L. Ed. 2d 797 ..... 10, 15

Burke v. U. S., 215 F. Supp. 508, 328 F. 2d. 399, cert. den., 379 U. S. 849, 85 S. Ct. 91, 13 L. Ed. 2d 52 12

Carnley v. Cochran, 369 U. S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 15

Gorman v. United States, 380 F. 2d 158 (CA 1, 1967) 16

Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461 ..... 10, 15

Katz v. U. S., 238 F. Supp. 689 13

Mapp v. Ohio, 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 5

Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 ..... 8, 15

People v. White, 32 Cal. Rptr. 322, cert. den., 376 U. S. 926, 84 S. Ct. 689, 11 L. Ed. 2d 621 12

Shaffer v. State, 184 A. 2d 689, cert. den., 374 U. S. 834, 83 S. Ct. 1882, 10 L. Ed. 2d 1056 11

State v. Colson, 1 N. C. App. 339 1

State v. Colson, 274 N. C. 295, 163 S.E. 2d 376 1

State v. Little, 270 N. C. 234 9

State v. McPeak, 243 N. C. 243, cert. den., 351 U. S. 919, 76 S. Ct. 712, 1 L. Ed. 2d 1451 9

United States v. Blalock, 255 F. Supp. 268 (D.C. Pa., 1966) 15

Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341 5

Zap v. U. S., 328 U. S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477 10

In The

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 915

WILLARD HORACE COLSON,

Petitioner

v.

STATE OF NORTH CAROLINA,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 1 N.C. App. 339.

The opinion of the North Carolina Supreme Court, which is the Appendix to Petitioner's Petition for Certiorari, is reported at 274 NC 295, 163 S.E. 2d 376.

JURISDICTION

The Petitioner seeks to invoke the jurisdiction of this Court under Title 28, U.S.C., § 1257 (3), alleging that the Petitioner has been deprived of his constitutional rights arising under the Fourth and Fourteenth Amendments to the Constitution of the United States.

QUESTION PRESENTED

WHETHER UNDER THE CIRCUMSTANCES, A SEARCH WARRANT WAS NECESSARY FOR THE POLICE TO SEE PETITIONER'S UNDERSHORTS, OR WHETHER THE CONSENT OF PETITIONER OBVIATED THE NECESSITY FOR SUCH A WARRANT?

STATEMENT

The Petitioner was indicted for the first degree murder of his wife. At the trial the State announced that it would seek a verdict of guilty of second degree murder or manslaughter, as the facts might warrant. The jury found Petitioner to be guilty of manslaughter and the Trial Court imposed a sentence of not less than twelve years nor more than fifteen years in the State's Prison.

Petitioner appealed to the North Carolina Court of Appeals, asserting, among other things, that his undershorts were improperly introduced into evidence by the State and that such was a violation of his constitutional rights. The Court of Appeals affirmed the judgment of the Trial Court and Petitioner then appealed to the North Carolina Supreme Court. The Supreme Court affirmed the Court of Appeals and in so doing passed upon the precise constitutional question raised by the Petitioner in this Petition.

The facts pertinent to this Petition for Certiorari are essentially as follows:

On the night of August 3, 1967, the wife of the Petitioner was stabbed to death in her home at Elizabeth City, North Carolina. Police officers were called to the house of the deceased by the son of the deceased, arriving at approximately 12:30 a.m. on the morning of August 4. They were admitted to the house by the son. The Petitioner was not present. The deceased was found slumped over on a sofa, her head on the armrest.

The deceased had died from a penetrating stab-wound

through the heart. There were multiple contusions and bruises over her body and face.

When the officers arrived at the house they made a search and found the murder weapon, a long butcher knife covered with blood. In the bedroom the officers discovered blood on the bedclothes. The blood type of the deceased was "AB." While the blood type of the Petitioner was determined to be type "O."

While the officers were still at the house and were in the process of putting the deceased's body into a hearse, the Petitioner came walking up to the front of the house and asked whether or not his wife had had a heart attack. The police officer told the Petitioner that she had been stabbed. Whereupon, the Petitioner asked, "What with, a butcher knife?" (T p 46). The police officer then asked the Petitioner and the son if they would mind coming with him to police headquarters for further investigation and questioning and the Petitioner voluntarily consented to do so (T pp 37-38).

After the Petitioner had been at the police station for some time and after he had been warned that anything he might say could be used against him, that he was entitled to counsel, that he had a right to remain silent, and that if he could not afford counsel the State would provide counsel for him (see T p 47), the Petitioner told the officers he wanted to show them a scar on his stomach. He opened his shirt and at that time Officer Owens noticed blood on his undershirt.

After the officer had seen the blood on the Petitioner's undershirt, the officer asked him if he could see the rest of his underclothes. The Petitioner complied and the officer then discovered that the Petitioner's undershorts contained blood spots. The Petitioner was asked how the blood got on his underclothes in the presence of his son, who likewise asked him, but he did not answer (T pp 58, 60).

The blood on the Petitioner's underclothes was type "AB," the same as that of the deceased.

The Petitioner had been at the police station approximately one hour when the officers saw the T-shirt and the undershorts and removed them from the Petitioner (T p 37).

Prior to any questioning by the police, the Petitioner was fully warned of his rights under the decisions of the United States Supreme Court (T pp 50, 51).

There was plenary other evidence in the record which placed the Petitioner at the scene of the crime at or about the time of its commission.

The evidence in the transcript as it relates to the intoxication of the Petitioner was to the effect that about three or four days before the slaying the Petitioner went on a drunk (T p 55) and on the night in question, after an argument with his wife, the Petitioner purchased some vodka, rode around and drank (T p 56).

After the officers had been at Petitioner's house for some time, the Petitioner came walking up. He had the odor of alcohol on his breath and was staggering some (T p 63).

The Petitioner was able to answer questions of the officers and, after he had been warned of his rights, gave them an exculpatory statement, which is contained in the Transcript between pages 51 and 58.

Other than this testimony, there is nothing in the record to determine the extent of the intoxication of the Petitioner.

The transcript of testimony will show that the Petitioner's counsel did not object to questions concerning the condition of the Petitioner's undershorts, nor the type blood found on them, but objected only when the State sought to introduce such undershorts into evidence (T p 40).

Formal arrest was made of the Petitioner after the blood had been discovered on his underclothes. The statement by the Petitioner in his Petition for Certiorari that Petitioner was not arrested until 8:30 or 9:00 a.m. the next morning is incorrect.

It is true that a warrant charging him with the crime was not obtained until that time.

DECISION BELOW

The North Carolina Supreme Court in its decision, which is reported at 274 NC 295, 163 S.E. 2d 376, in passing upon the Petitioner's contention that his constitutional rights had been deprived, ruled that the Petitioner's rights had not been violated.

The Supreme Court in passing upon this question, after noting the exclusionary rule established by this Court in WEEKS v. U. S., 232 U.S. 383, 58 L. Ed. 652, 34 S. Ct. 341, and the extension of such rule to the states by the Court's decision in MAPP v. OHIO, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, said:

> "So, in the case before us, if the circumstances under which defendant's clothing was taken required the issuance of a search warrant, the seizure was unlawful and the evidence inadmissible. Otherwise not.
>
> "The Constitution does not prohibit all searches and seizures but only those which are unreasonable. *Carroll v. United States,* 267 U.S. 132, 69 L. ed 543, 45 S. Ct. 280; *Elkins v. United States,* 364 U. S. 206, 4 L. ed 2d 1669, 80 S. Ct. 1437. An unreasonable search has been defined as 'an examination or inspection without authority of law of one's premises or person, with a view to the discovery of . . . some evidence of guilt, to be used in the prosecution of a criminal action. 47 Am. Jur., Searches and Seizures § 52.
>
> "An individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search of his person, an individual cannot thereafter complain that his constitutional rights have been violated. If one

voluntarily permits or expressly invites and agrees to the search, being cognizant of his rights, such conduct amounts to a waiver of his constitutional protection. 47 Am. Jur., Searches and Seizures § 71 and cases cited: *State v. McPeak*, 243 N.C. 243, 90 S.E. 2d 501; *State v. Moore*, 240 N.C. 749, 83 S.E. 2d 912.

"Furthermore, under circumstances requiring no search, the constitutional immunity never arises. This principle is aptly stated in 47 Am. Jur., Searches and Seizures § 20, as follows: 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure without warrant where there is no need of a search, and where the contraband subject matter is fully disclosed and open to the eye and hand. See *State v. Giles*, 254 N.C. 499, 119 S.E. 2d 394; *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736; and *State v. Kinley*, 270 N.C. 296, 154 S.E. 2d 95.

"Applying these principles to the evidence regarding defendant's clothing, we are of the opinion that the circumstances prevailing at the police station when defendant's clothing was taken required no search warrant. There was no need to search . . . "

In summary, the Supreme Court of North Carolina, under the factual situation presented, held that no search warrant was required for the officers to see the underclothing of the Petitioner. The Petitioner, by his conduct in voluntarily showing his T-shirt and then by showing his undershorts at the request of the officers, waived his rights. This is the gist of the ruling of The Supreme Court of the State of North Carolina after its careful review of the decision of the North Carolina Court of Appeals.

ARGUMENT

NO SEARCH WARRANT WAS REQUIRED OF THE OFFICERS TO SEE PETITIONER'S UNDERSHORTS

UNDER THE CIRCUMSTANCES IN THIS CASE, AND THE ABSENCE OF SUCH WARRANT IN NO WAY VIOLATED THE PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS NOR WAS THE EVIDENCE AGAINST THE PETITIONER RENDERED INADMISSIBLE.

As the State understands the Petitioner's argument, it boils down to this: The Petitioner contends that he was so intoxicated at the time the officers asked to see his undershorts that he could not intelligently consent to the showing of his undershorts and thus could not intelligently waive his rights under the Fourth Amendment. Thus, he argues that a search warrant was required.

The factual situation as shown by the record does not back up the Petitioner in this regard. It is true that the words "highly intoxicated" do appear in the record in response to a question asked of the police officer by the Petitioner's counsel. Likewise, the North Carolina Supreme Court in its opinion stated that, at the time Petitioner came to the scene of the crime, he was intoxicated. The only reference in the record to Petitioner's condition, with respect to intoxication, and the degree thereof, ensues in the cross-examination of State's witness by Petitioner's counsel (T p 63). It refers to Petitioner's supposed condition at the time the officers first saw him at the house, and not to his condition when he was at the police station some hour or so later being questioned.

After the Petitioner came back to the house where his wife's body was being placed in the hearse, he was asked to come to the police station. He did so voluntarily, along with his son (T pp 65, 66).

When the Petitioner came up to the house, where the officers first saw him, he had the presence of mind to ask the officers what was wrong. He then asked if his wife had had a heart attack (T p 46). When the Petitioner was told that

his wife had been stabbed, he then asked, "What with, a butcher knife?" (T p 46).

A *voir dire* examination was held at the request of Petitioner's counsel to determine the voluntariness of certain statements made by the Petitioner prior to his being arrested or taken into custody (T p 44). Nowhere in the *voir dire* examination did the Petitioner's counsel attempt to factually develop the state of intoxication of the Petitioner, if any, when he first came to the house. The Court ruled after the *voir dire* examination (T p 48), that the statements made by the Petitioner were a result of his own volition and that they were voluntary and willingly made without questioning or prompting.

Following the *voir dire* examination, the jury was called back in and the State was allowed to offer into evidence a statement made by the Petitioner after he arrived at the police station (T pp 50-58).

The statement made by the Petitioner, which is exculpatory in nature, which followed the warning required by this Court's decision in MIRANDA v. ARIZONA, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, shows that the Petitioner was in full charge of his mental faculties. His answers to the questioning police officers were clear and lucid. This statement of the Petitioner was taken before he was asked by the police officers to show his undershorts and shows that the Petitioner was mentally capable of intelligently waiving his rights and that his attitude was one of cooperation with the officers.

The State emphasizes to the Court that this entire statement came into evidence without an objection on the part of Petitioner's counsel and without any contention whatsoever on his part that, at the time, the Petitioner was unable by reason of his intoxication to understand and know the nature and quality of his acts.

As to the undershorts themselves, the police officers saw them under the following circumstances (T p 59): During the

conversation with police officers Petitioner offered to show them a scar on his stomach, at which time blood was discovered on his undershirt. It was at this time that the officers asked him to pull down his trousers so that they could see his undershorts. Apparently, the Petitioner's son was present at the time and asked his father how the blood got on his undershorts.

It is well established in the decisions of North Carolina, as well as in the Federal Courts, and indeed by numerous decisions of this Court, that a constitutional right, including the constitutional right guaranteed by the Fourth Amendment, may be waived under certain well-defined conditions.

In STATE v. McPEAK, 243 NC 243, cert. den., 351 U.S. 919, 76 S. Ct. 712, 1 L. Ed. 2d 1451, the Supreme Court of North Carolina set forth the principle of waiver and the condition of such waiver as it is applicable in this jurisdiction. The Court said:

> "It is well settled law that a person may waive his right to be free from unreasonable searches and seizures. A consent to search will constitute such a waiver, only if it clearly appears that the person voluntarily consented, or permitted, or expressly invited and agreed to the search. Where the person voluntarily consents to the search, he cannot be heard to complain that his constitutional and statutory rights were violated. *S. v. Moore,* 240 N.C. 749, 83 S.E. 2d 912 (where many cases are cited); *Zap v. U.S.*, 328 U.S. 624, 90 L. Ed. 1477; *People v. Preston,* 341, Ill. 407, 173 N.E. 383; 77 A.L.R. 631; 47 Am. Jur., Searches and Seizures, Sec. 71; 79 C.J.S., Searches and Seizures, Sec. 62."

A more recent decision of our Court, STATE v. LITTLE, 270 NC 234, cited by Petitioner, makes it clear that "consent" to a search must, in fact, be voluntarily, freely and intelligently given. The decision likewise makes it clear that the burden is on the State to establish that the consent relied upon was

voluntarily given. Addressing itself to this particular point, the Court said:

> "The burden of proof is upon the State to establish by clear and positive testimony that consent was so given. *Judd v. U.S.*, supra; *State v. King*, supra; *79 C.J.S.*, Searches and Seizures, Sec. 62 (a), page 819."

These decisions agree with the decisions of the Supreme Court of the United States as set forth in JOHNSON v. ZERBST, 304 U.S. 458, 82 L. Ed. 1461; ZAP v. U.S., 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477; AMOS v. U. S., 255 U. S. 313, 41 S. Ct. 266, 65 L. Ed. 654; BUMPER v. NORTH CAROLINA, 88 S. Ct. ...., 20 L. Ed. 2d 797.

In the matter at hand the Respondent respectfully submits that all of the circumstances show that the Petitioner voluntarily and intelligently consented to exhibiting his undershorts to the officers. As a matter of fact, the quality of the Petitioner's act in revealing his underclothes was, in the first instance, spontaneous. In the course of conversation with Officer Owens, Petitioner told the officer that he wanted to show him a scar on his body. He then revealed his undershirt (T pp 36, 37).

Upon seeing that the undershirt was bloody, Officer Owens then asked to see Petitioner's undershorts and the record shows that the Petitioner complied. This came at a time when the Petitioner was in custody of the officers, though not under arrest, by reason of his voluntary compliance with their request that he come to the police station.

Other circumstances tending to how the voluntary nature of Petitioner's act in revealing his undershorts are as follows:

Petitioner, as the record shows, had been fully informed of his rights against self-incrimination and of his right to counsel prior to any questioning by the police officers and before he revealed his undershorts (T pp 50, 51). During the time when Petitioner was at the police station he was in the presence of his son, who at the request of officers, likewise came to the police station (T p 60).

After being informed of his rights by police officers, the Petitioner gave a statement which was reduced to writing and shows that the Petitioner at the time was in substantial control of his mental faculties and knew what he was doing (T pp 51-59). A reading of the statement made by the Petitioner, which was introduced into evidence without objection on the part of the Petitioner's counsel, shows that his attitude towards the officers was one of cooperation. When asked by officers if he wished to answer questions which they wanted to ask him, Petitioner replied, "I certainly do" (T p 51). His explanation of what happened, as contained in his statement, is certainly detailed enough to show that the Petitioner had a good awareness of the predicament he was in and the possible consequence of his answers.

There is nothing in the record, on the other hand, to show any duress or coercion on the part of the police officers, either direct or indirect. The atmosphere surrounding the request of the officers to see his undershorts is one which imports consent freely and intelligently given. This is especially true when taken in the light of the fact (uncontradicted by the Petitioner) that Petitioner spontaneously revealed some of his underclothes. Undoubtedly, the undershirt which the Petitioner wore was evidence as equally condemning as his undershorts.

Our research does not reveal any case which is factually on all fours with the case at hand; however, SHAFFER v. STATE, 184 A. 2d 689, cert. den., 374 U.S. 834, 83 S. Ct. 1882, 10 L. Ed. 2d 1056, is somewhat analogous. In that case, the defendant, a burglary suspect, was picked up by police as he was walking along a road some two miles from the scene of the burglary. He was taken to police headquarters for questioning and was asked to empty his pockets. He did so and produced a twenty dollar bill which had serial numbers on it in sequence with other twenty dollar bills held by the victim of the burglary in his wallet. The defendant contended that the twenty dollar bill was illegally seized. The Delaware Supreme Court held that under the circumstances the defendant had consented to the search. The uncontradicted testimony

of the officer was to the effect that the defendant was cooperative. The United States Supreme Court denied certiorari. It will be noted, that, in the case at hand, counsel for Petitioner on cross-examination asked police officer Owens if the Petitioner had been cooperative with him after he was taken to police headquarters. The officers stated that the Petitioner voluntarily came along, did not give the officers any trouble or difficulty, and was otherwise cooperative with the police (T p 74).

In PEOPLE v. WHITE, 32 Cal. Rptr. 322, cert. den., 376 U.S. 926, 84 S. Ct. 689, 11 L. Ed. 2d 621, the United States Supreme Court denied certiorari in circumstances where the petitioner was in the custody of the police when they stopped him in the hall of a hotel. They asked for his permission to search his person and he replied, "Yes, you can. Go ahead." The officers searched and found implicating evidence under petitioner's armpit. It is noted that in this particular case the petitioner took the stand to deny that he had given consent for the search of his person.

In the case at hand, counsel for Petitioner did not request to be heard on the question of voluntariness of consent to the search, and Petitioner, of course, did not take the stand on *voir dire* examination.

The defendant in BURNETT v. U.S., 215 F. Supp. 508, 328 F. 2d 399, cert. den., 379 U.S. 849, 85 S. Ct. 91, 13 L. Ed. 2d 52, was arrested, taken to the police station, booked and searched. Subsequently, a Federal postal inspector came to the station and asked defendant if he could see what he had in his pockets. The defendant complied and emptied his wallet. Two marked twenty dollar bills were found. The defendant agreed to exchange these twenty dollar bills for two other bills. The two bills taken from the defendant were subsequently introduced into evidence. The defendant's arrest was held to be illegal. The Court held, however, that the defendant had consented to the search or to the exchange of the twenty dollar bills and that such evidence was not rendered inadmissible.

In KATZ v. U. S., 238 F. Supp. 689, Katz was detained on the sidewalk as he was carrying two packages and was invited to step inside a government car by custom agents. He agreed to do so. The government agent asked to see the packages which he had. Katz handed the packages to the agent but the agent told him that he would prefer that Katz open the packages. Katz complied and revealed a number of Swiss watch movements upon which no custom had been paid. Katz acquiesced in going to police headquarters and in having his car searched. The Court held that under the circumstances Katz had voluntarily consented to the search, noting the defendant's cooperation with the officers and the help which he rendered them.

In the case at hand, counsel for Petitioner did not ask to be heard on the question of whether Petitioner had voluntarily given his consent to the exhibition of his undershorts. The transcript merely shows in this respect that defense counsel objected when the State offered the undershorts into evidence as State's Exhibit 19 (see T p 40).

It was the contention of the State before the Supreme Court of North Carolina and it is the contention of the State at this time that the Petitioner waived any objection he might have had to the introduction of the Petitioner's shorts into evidence by failing to make timely objection. The record in this respect is clear. It reads as follows:

> "Q. I show you another exhibit, cloth identified as SX-19, and ask you if you recognize that?
>
> "A. Yes, sir. One pair of men's undershorts, which were worn by the defendant, Willard Colson, at the time.
>
> "Q. I ask you whether or not it is in the same general condition as they were at the time you removed them from the defendant?
>
> "A. The blood spots, as you will notice, onto the right side, the right leg, in this area, here, and here (indicating)

are the same. The cut out places here, and up there, and the cut out place on the left leg was not there.

"Q. And were the numbers on there?

"A. The numbers were not on there, or the cut out holes on the right leg, and left leg. Blood spots still remaining were there, in addition to other blood that has been cut out.

"Q. Except for those spots that you have indicated, they are in the same condition?

"A. They are.

By the Solicitor:

Offer Sx-19 in evidence."

The Solicitor was allowed to ask the witness, without any objection whatsoever, questions about the Petitioner's undershorts and to establish that they were worn by the defendant when he was in the custody of the police, that they had blood spots on them, etc.

Also, with respect to said exhibit, the Solicitor was allowed to ask the expert serologist, without objection, whether he had examined the shorts and the type of human blood on them. Without objection, it was established that the human blood on the undershorts of the defendant was group "AB" type. This was the same as the deceased's blood type (T p 92).

In view of this fact in the record, it is hard to see how the Petitioner was prejudiced at all by the actual admission of the article into evidence. The Solicitor had already established the evidence damning to the Petitioner without an objection on the part of counsel.

Furthermore, evidence of like character and nature, i.e., the blood-stained undershirt of the Petitioner, had been introduced into evidence under conditions where the Petitioner had plainly displayed it to the officers on his own volition.

The cases cited by Petitioner are factually distinguishable from the case at hand. The BUMPER decision, supra, is concerned with a search conducted under circumstances where the officers told the landlady where defendant lived that they had a search warrant to search her house. She admitted them and a search was conducted. The State, however, relied not upon the search warrant, but upon consent of the landlady. This Court held that a search conducted in reliance upon a search warrant cannot later be justified on the basis of consent, if the warrant turns out to be invalid. There was no "consent" under such circumstances said the Court.

MIRANDA v. ARIZONA, supra, cited by Petitioner, deals with rights arising under the Fifth and Sixth Amendments. The principles of that case appear to have been meticulously applied and followed in this case.

JOHNSON v. ZERBST, supra, was a habeas corpus proceeding concerning the conviction of two defendants of serious charges without the assistance of defense counsel. This Court in reversing and remanding the matter discussed the waiver of right to counsel. CARNLEY v. COCHRAN, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, also concerning the right to counsel, established that due process of law is violated by the failure of an illiterate defendant to have counsel in a felony case. The Court went on to say that the mere acquiescence of the illiterate defendant does not constitute a waiver of the constitutional right to counsel. The transcript in the instant case clearly distinguishes this case from CARNLEY. The Petitioner's action here in voluntarily exposing his undershorts was more than mere acquiescence. Further, the question of Petitioner's literacy is not at issue here.

The case of UNITED STATES v. BLALOCK, 255 F. Supp. 268 (D.C. Pa., 1966) takes a new, if not novel, position with respect to a waiver of the rights protected by the Fourth Amendment. The position of the District Court in that case is to the effect that in order to have an effective waiver of the rights guaranteed by the Fourth Amendment, the individual

must be informed that he has the right to insist on a search warrant.

We would be less than candid if we did not conclude that adoption of that premise to the case at hand, would require a reversal. The Supreme Court, as far as we are aware, has not adopted such requirement as being requisite to voluntary and intelligent waiver of a search warrant.

In our research, we find that the United States Court of Appeals in GORMAN v. UNITED STATES, 380 F. 2d 158 (CA 1, 1967) specifically rejected the rule suggested by BLALOCK, supra, and in so doing said (p 164):

> "We cannot accept the recently suggested rule that a specific warning of fourth amendment rights is necessary to validate a warrantless search after the suspect has been arrested. (Citing cases)"

After mentioning the application of the MIRANDA rule, the Court went on to say (p 164):

> " . . . While the police interrogators must faithfully carry out MIRANDA's mandate at the threshold, they may then proceed to elicit responses, however incriminating, without further specific warning. To single out for further warning a request to search premises of an accused is to assume that a different order of risks has not been covered at the threshold. But that things which might be found in a search could be used against an accused seems implicit in the warning of the right to remain silent which, as the Court observed, is calculated to make him 'more acutely aware * * * that he is not in the presence of persons acting solely in his interest.' . . . "

While we do not know what ultimate resolution of the differences of opinion as between the courts might be, we do suggest that the case at hand does not present a factual situation calling for the adoption of the BLALOCK rule. In the case at hand, the Petitioner was cooperative with the officers, as estab-

lished by his counsel and, while in charge of his faculties, he voluntarily showed his undershorts to them.

CONCLUSION

The Petitioner's case has been tried and reviewed by two reviewing courts. The question raised by Petitioner has been carefully considered and answered adversely to him. The total circumstances surrounding the exposure of Petitioner's underclothes import a voluntary act on the part of Petitioner. Further, we make the observation that the piece of evidence in question, the undershorts, was not a critical piece of evidence. Indeed, the Petitioner's undershirt was likewise admitted into evidence against him. The admission into evidence of his undershorts following extensive questioning by the Solicitor as to them (without objection being taken), was nothing more than cumulative evidence.

In this case the Petitioner made an intelligent and voluntary waiver of his right to insist on a search warrant by his actions and words, clearly and cogently shown of record.

Respectfuly submitted,

ROBERT MORGAN
Attorney General

Bernard A. Harrell
Assistant Atttorney General